Indenture of 25-9-37 (Document P) (p. 39)
Between Public Trustee
And
Yeap Chor Ee

Recital
All that piece of land comprised in Statutory Grant 2627, Grants 1875, 2609, 1777, Indentures 60, 177, 124, 140, 71 & 53 and Lease 10018 and 10044 said to form Lot 240 (formerly Lots 71 and 122) Mk. 4 of 347a. 2r. 00p.

And also Lot 220
And also Lot 69(1)
Fee simple in possession

Habendum of freehold in fee simple and of leasehold tenure for respective unexpired residue of term.

Dy. C.L.R.B.P.'s note: same as above

Indenture of 14-12-2602 (1942) (Document Q) (p. 45)
Between Ban Hin Lee Bank Ltd.
And
Tan Aik Joo

Recital
Recites the 12 titles (Lot 240)
Also Lot 220
Also Lot 69(1)
Fee simple in possession

Habendum to hold in fee simple and for unexpired terms of leases

D.O.B.P.'s note: Lot 240 347a. 2r. 00p.

Indenture of 19.9.51 (Document R) (p. 49)
Between Tan Aik Joo
And
A. Kandsamy

Recital
The 12 titles (Lot 240)
And also Lot 220
And also Lot 69(1)
in fee simple and entitled to lands etc. assigned.

Habendum To hold in fee simple and unexpired term etc.

D.O.B.P.'s note: Lot 240
347a. 2r. 00p.

Indenture of 1.8.53 (Document S) (p. 53)
Between A. Kardasamy
And
Ban Hin Co. Ltd.

Recital
Lot 240
Lot 220
Lot 69(1)
Fee simple in possession and also entitled to leasehold lands

Habendum As to freehold lands to hold same unto Co. and its assigns and as to leasehold lands to hold same for mentioned term.

TENGKU JAYA BIN RAJA HASSAN v. MOHAMED BIN ZAKARIA & ANOR. (TALASCO INSURANCE SDN. BHD., Intervener)

[O.C.J. (Abdul Malek J.) September 17, 24 & October 31, 1985]

[Kota Bharu – Civil Suit No. 93 of 1983]

Practice and Procedure – Default of appearance – Interlocutory and final judgments – Application to set aside – Intervention by insurer – R.H.C. 1980 0.12 r.4(a).

Tort – Negligence – Damages – Assessment – Interlocutory and final judgments – Setting aside – Intervention by insurer – Road Traffic Ordinance 1958, s.80.

This is an appeal by the first defendant and the intervener against the dismissal of the first defendant's application to set aside the judgment and the intervener's application to intervene. The plaintiff had obtained on October 13, 1983 interlocutory judgment against both defendants in default of appearance and final judgment on July 25, 1984 after a hearing to assess damages, where the first defendant was present. On January 28, 1985 the first defendant applied to have both judgments set aside on the grounds that he was not served with the writ and that there were merits in the defence. On March 4, 1985 the intervener (the insurer) applied for an order that it be at liberty to intervene in the proceedings.

Held: (1) service was regular on both the defendants and that the insurer was liable as the required notice had been served on it;

(2) from the sketch plan, the first defendant was solely to blame for the accident. He had failed to produce to the court evidence that he had a *prima facie* defence;

(3) there was no reason to set aside the interlocutory and final judgments against both defendants or to allow the intervener to intervene at this late stage.

[*Editorial Note:* Appeal to the Supreme Court filed on October 21, 1985 was withdrawn on January 28, 1986]

[Cases cited: *Bank Bumiputra Malaysia Bhd.* v. *Majlis Amanah Ra'ayat* [1979] 1 M.L.J. 23; *P.T. Pelajaran Nasional Indonesia* v. *Joo Seang & Co. Ltd.* [1958] M.L.J. 113; *Leonard* v. *Nachiappa Chetty* (1923) 4 F.M.S.L.R. 265; *Ang Chee Seng* v. *Tan Khee Swee* [1935] M.L.J. 245; *Chua Soo Lee & Anor.* v. *City Council of Singapore* [1967] 2 M.L.J. 121; *Re Youngs* (1885) 30 Ch.D. 421; *Re Application of Asia Insurance Co. Ltd.* [1968] 2 M.L.J. 228; *Chong Kueng Ying & Ors.* v. *Lovis Lavagna* [1971] 2 M.L.J. 225; *The Chinese Tin Mines Rehabilitation Loan Board* v. *Chee Hoi Voon* [1959] M.L.J. 152; *The Hongkong & Shanghai Banking Corporation* v. *Ismail bin Daud & Anor.* [1978] 2 M.L.J. 160; *Evans* v. *Bartlam* [1937] A.C. 473.]

CIVIL SUIT.

Anthony Gomez for both defendants and intervener.

Mohamed Nordin Noor for the plaintiff.

Cur. Adv. Vult.

Abdul Malek J.: Interlocutory judgment had been entered for the plaintiff against both defendants on October 3, 1983 in default of appearance and final judgment made on December 8, 1984 after a hearing to assess damages on July 25, 1984. The first defendant was present at the assessment hearing.

On January 28, 1985 the 1st defendant applied to have both judgments set aside on the grounds that he was not served with the writ on June 5, 1983 as alleged and that there were merits in the defence case according to the sketch plan and his police report. In his affidavit, he also stated that the final judgment against the 2nd defendant was irregular as the latter had passed away on July 13, 1983.

On February 29, 1985 the 2nd defendant's son filed an affidavit stating that his father died on July 13, 1983 and that he was told by the solicitors for the insurers of the two judgments only in January 1985. On making a search in his father's office, he said he found two copies of the writ in this action and that the second copy was meant for the 1st defendant.

On March 4, 1985 the insurers filed a Summons in Chambers for an order that they be at liberty to intervene, that the interlocutory and final judgments be set aside, that execution be stayed pending the disposal of their application and that the 2nd defendant's son be appointed as representative of the 2nd defendant's estate upon the setting aside of the judgments and thereupon be allowed to enter appearance and file his defence within three weeks.

On March 10, 1985 counsel for the plaintiff filed an affidavit in reply stating that:

(a) the notice to the insurers was served on March 26, 1983 by registered post;

(b) the writs of summons and statement of claim were filed on May 17, 1983;

(c) the writs of summons and statement of claim were served on both defendants on June 5, 1983;

(d) the certificate of non-appearance and judgment was filed on October 3, 1983;

(e) the assessment was fixed on April 28, 1984 and the insurers duly informed by registered post;

(f) the assessment was postponed to July 27, 1984;

(g) the 1st defendant was present both on April 28, 1984 and July 27, 1984;

(h) the 1st defendant had no capacity to depose for the deceased 2nd defendant.

On the same date, the Court process server also filed his affidavit of service on both defendants and stated that the 2nd defendant had acknowledged service by signing on the proof copy but the 1st defendant had refused to do so. He had then left the writs with each of the defendants on June 5, 1983.

On April 1, 1985 the insurers filed another affidavit stating that although they were obliged to pay in satisfaction of the judgment by virtue of section 80 of the Road Traffic Ordinance 1958 in view of the service of the judgment on them on May 7, 1984, they were making the application to set aside because the service on both defendants were irregular.

After hearing arguments on April 4, 1985, the Senior Assistant Registrar decided on April 11, 1985 to dismiss the 1st defendant's application to set aside the judgment and the intervener's application to intervene and for the other consequential orders. Against this decision, the 1st defendant and the intervener appealed.

After hearing arguments in Chambers on September 17, 1985 and having dutifully considered all the affidavits, I decided on September 24 that the appeal should be dismissed with costs. I also issued a certificate on October 2, 1985 stating that I did not wish to hear further arguments when this was applied for by counsel for the defendants.

It was not disputed at the hearing of the appeal that we were concerned with four issues:

(a) the position of the 1st defendant;

(b) the position of the estate of the 2nd defendant;

(c) the position of the intervener; and

(d) whether the facts disclose that the defence had merits.

As regards the service on the 1st defendant, I held that it was regular although the Court process server filed his affidavit only on March 10, 1985. He did so in view of these proceedings and despite the lapse of time, I saw no reason to reject the affidavit. The endorsement on the writ had stated "ditinggalkan Kepada" the 1st defendant and the process server's affidavit clarified that he had left a copy of the writ with each of the defendants although the 2nd defendant had acknowledged by signing and the 1st defendant had refused to do so. I can find no authority, as counsel for the appellants had submitted, to state that an affidavit should be rejected if it was not made immediately after the event The maker of this affidavit was also a Court official and rejecting his affidavit was tantamount to defeating the course of justice. I was satisfied therefore that the writ had been served personally on the 1st defendant. In any case the 1st defendant was present at both the hearings on assessment on April 28, and July 27, 1984 respectively and should have taken steps to set aside the judgments at that stage.

The service on the 2nd defendant was also on June 5, 1983 and he had duly acknowledged it. He died on July 13, 1983 but there is nothing to show that the plaintiff or anyone else involved in this case was aware of it until these proceedings were commenced. Order 12 rule 4(a) of the Rules of the High Court is implicit that appearance has to be entered within eight days of the service and it is clear that the 2nd defendant had failed to do so within the prescribed time. Similarly he had failed to enter his defence within 14 days after that as required by Order 18 rule 2(1). If a party who is properly served with a writ chooses not to do anything within the prescribed period and dies about a month after that, should the party serving the writ be held liable and responsible when he only becomes aware of the death some 21 months later? I certainly think not as the action survives and is not abated by reason of the death of a party to the action. In the circumstances the substitution of the 2nd defendant can be applied for by any party at any stage of the proceedings. In the present situation, the plaintiff is at liberty to do so to enforce judgment. Accordingly I held that the death of the 2nd defendant before judgment was entered in this case should not affect the validity of the proceedings as there had been good personal service on the 2nd defendant and the substitution of a party by reason of death was only a formality for the purpose of representation at whatever stage of the action.

The insurers were served with the notice under section 80 of the Road Traffic Ordinance 1958 before the writ was filed on May 17, 1983. From the acknowledgement card, it is noted that they had received it on March 20, 1983. The notice of the hearing of the assessment on April 28, 1984 had been sent to them on January 30, 1984. When it was postponed to July 27, 1984, the insurers were informed on April 30, 1984. The order on the final judgment made on December 8, 1984 was served on them on January 1, 1985. Despite all these, they filed the application to set aside the judgment only on March 4, 1985 almost two years after first knowing of the proceedings to be taken against the insured. I am well aware that delay does not prohibit any person from applying to set aside a judgment but in the circumstances of this case, I was of the opinion that the insurers had not taken the proper steps from the beginning and should therefore, after all had been said and done, be precluded from intervening considering that their application was in the first instance based only on the affidavit of the 2nd defendant's son that his father had passed away one month and eight days after the writ had been served on him. In short they had failed to provide a reasonable excuse for not entering appearance in the first place.

The last point to consider, having found that service was regular on both the defendants and that the insurers were liable as the required notice had been served on them, is whether there were merits in the defence to justify the setting aside of the judgment. Annexed to the 1st defendant's affidavit dated January 27, 1985 was his police report and the police sketch plan. In his police report he stated that the plaintiff's motorcycle fell in front of his lorry and though he applied his brakes and avoided it, he was not successful in avoiding the accident. What he had apparently failed to disclose in that report was that this happened when he had encroached practically a hundred percent onto the plaintiff's side of the road as can be clearly seen in the sketch plan. There is no doubt at all from the sketch plan that the 1st defendant was solely to blame for the accident and to my mind, he had therefore failed to produce to the Court evidence that he has a *prima facie* defence.

On these considerations and guided by the applicable authorities cited, I saw no reason to set aside the interlocutory judgment given on October 3, 1983 and final judgment given on December 8, 1984 against both defendants or to allow the insurers the liberty to intervene at this late stage. Accordingly, I dismissed the appeal against the order of the Senior Assistant Registrar with costs.

Order accordingly.

Solicitors: *A. Gomez & Co.; Wan Haron, Sukri & Nordin.*

PUBLIC PROSECUTOR v. NARONGNE SOOKPAVIT & ORS.

[A.Cr.J. (Shankar J.) September 22, 1985]

[Johore Bahru – Criminal Appeal No. 59 of 1984]

Public International Law – Law of the Sea – Thai fishermen in Malaysian waters – Contravened Reg. 3(b) of Fisheries (Maritime) Regulations 1967 – Whether right of innocent passage – Whether boat and fishing appliances to be forfeited in absence of conviction – Fisheries (Maritime) Regulations 1967, Regs. 1 & 3(a)(b) – Fisheries Act 1963 (Rev. 1979) ss. 2, 11(1), 13(1), (2) & 14(1)(b), (2) – Emergency (Essential Powers) Ordinance 1969, s. 3; Schedule, Arts. 6, 12 – Malaysian Constitution, Arts. 74 & 76(1) – Convention of the Territorial Sea, Arts. 13, 14 – Evidence Act 1950, ss. 13, 14 & 45 – Geneva Convention on the Territorial Sea and the Contiguous Zone (1958).

Criminal Law and Procedure – Fisheries – Contravention of Fisheries (Maritime) Regulations 1967, Reg. 3(b) – Response to distress call – Acquittal – Whether boat and fishing appliances to be forfeited in absence of conviction – Fisheries Act 1963, ss. 13(2) & 14(2).

The respondents are fishermen of Thai nationality. On January 27, 1984 at about 4.30 pm they were on a vessel (Registration No. SC2219) ("the boat") which was then at a bearing of 300° from Tanjung Ayam, Johore, about 3 miles from the shore. On board were fishing appliances and a large quantity of fish. The respondents were thus apprehended by a Malaysian Naval Patrol vessel. The fish was auctioned off for $2,000 and the respondents were charged for being found in possession of the fishing appliances in contravention of Regulation 3(b) of the Fisheries (Maritime) Regulations 1967 ("the Regulations") and punishable under section 11(1) of the Fisheries Act 1963 (Rev. 1979) ("the Act").

All the accused pleaded not guilty. The learned Magistrate acquitted all the accused and ordered that they be immediately deported to their homeland. He also ordered the boat, the fishing appliances and the proceeds of the auction sale to be returned to the rightful owner. The Prosecution filed a Notice of Appeal but only against the order releasing the fishing appliances and the boat. The Prosecution also applied for and obtained a stay order whereby the exhibits which were the subject matter of appeal could be further detained.

On appeal, the issues before the Court were (1) whether Regulation 3(b) of the Regulations created an offence of strict liability; (2) whether in the absence of a conviction, the Court trying such an offence can still make an order for the forfeiture of the subject matter of the offence; and (3) the extent to which Malaysia may exert general legislative authority within its territorial waters even if by so doing persons claiming to be exercising the so-called right of innocent passage may be adversely affected.

Held: (1) the evidence given in the Court below proved the commission of an offence under section 11(1) of the Act in that by being in possession of fishing appliances without a licence within territorial waters the accused had failed to comply with Regulation 3(b) and were consequently guilty of an offence under section 11;

(2) the boat and the fishing appliances were the subject matter of the offence and notwithstanding that no person was convicted of such an offence in the Court below, an order of forfeiture should have been made. The order must be that the boat and the fishing appliances in question are forfeited and shall be disposed of as the Police shall direct. The order of the learned Magistrate is set aside to that extent. The proceeds of the sale in the sum of $2,000 shall be disposed of by the Director-General of Fisheries in accordance with the jurisdiction vested in him by section 13(2) and section 14(2) of the Act;

(3) the material before the Court in this case was inadequate to come to any positive conclusion as to whether innocent passage through Malaysian territorial water is a right and if so what were its precise limits;

(4) even if there was such a right of innocent passage and such right was in conformity with customary English law or customary international law as it is applied in England, the passage by the accused persons in the circumstances of this case could not be regarded as innocent passage since it contravened Malaysian domestic legislation.

Obiter dictum: The moral of this story therefore would appear to be that urgent inter-governmental action is required to clarify the extent of the privilege or the right of innocent passage through these waters.

Cases referred to:

(1) *Public Prosecutor* v. *Ismail b. Yusoff* [1979] 2 M.L.J. 119.
(2) *Sak & Anor.* v. *Public Prosecutor* [1978] 1 M.L.J. 181.
(3) *Public Prosecutor* v. *Sai & Ors.* [1980] 2 M.L.J. 153.
(4) *Whitney* v. *Robertson* (1888) 124 US 190, 194.
(5) *Lauritzen* v. *Larsen* (1953) 345 US 571, 582.

CRIMINAL APPEAL.

Abdul Rahim bin Uda (Deputy Public Prosecutor) for the appellant.

Abbas Ismail Rowland for the respondent.

Cur. Adv. Vult.